82-1085

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. ARCUDI, *Chairman, Board of Compensation Commissioners, State of Connecticut;*
ROBIN W. WALLER, *Workers' Compensation Commissioner, Second District, State of Connecticut*

Petitioners

v.

STONE & WEBSTER ENGINEERING CORPORATION

Respondents

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether this case presents a justiciable case in controversy under the Declaratory Judgment Act or is rendered moot in view of the fact that the Connecticut statute held preempted was repealed and modified during the pendency of this action prior to the decision of the United States Court of Appeals for the Second Circuit?

2. Whether 28 U.S.C. §1331 affords federal question jurisdiction for an employer to assert a preemption defense to a state proceeding under the Employee Retirement Income Security Act (ERISA) when the terms of ERISA provide no jurisdiction for employers to institute actions thereunder?

3. Whether the Employee Retirement Income Security Act (ERISA) preempts Connecticut General Statutes §31-51h?

PARTIES

The parties in the proceeding before the United States Court of Appeals for the Second Circuit were Stone & Webster Engineering Corporation, plaintiff-appellee, and David B. Ilsley; Robin W. Waller, Workers' Compensation Commissioner, Second District, State of Connecticut; John A. Arcudi, Chairman, Board of Compensation Commissioners, State of Connecticut; and Sprinkler Fitters Union Local 676, defendants-appellants.

David B. Ilsley and the Sprinkler Fitters Union Local 676 are not parties in the present appeal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit issued September 30, 1982 is unpublished and is reprinted in the Appendix attached hereto at 3a.

The opinion of the United States District Court for the District of Connecticut is reported at 518 F.Supp. 97 and is reprinted in the Appendix attached hereto at 18a.

JURISDICTION

This action was brought in the United States District Court for the District of Connecticut pursuant to 28 U.S.C., §§1331, 1337, 1391, 2201, 2202 and §§29 U.S.C. 1132(e)(1), 1132(e)(2), to declare preempted and enjoin enforcement of Connecticut General Statutes §31-51h as contrary to the Employee Retirement Income Security Act, 29 U.S.C. §§1001, *et seq.*, and the Supremacy Clause of the United States Constitution.

The judgment of the Second Circuit Court of Appeals was entered on September 30, 1982. Notice of Appeal was filed in the Second Circuit Court of Appeals November 8, 1982.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(2). *See Delta Airlines v. Kramarsky*, 485 F.Supp. 300, 666 F.2d 21 (2d Cir. 1981), *vacating* 650 F.2d 1287 (2d Cir. 1981), *prob. juris. noted*, 102 S.Ct. 1968 (1982); *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following relevant constitutional and statutory provisions are reprinted in the Appendix attached hereto at 33a:

Employee Retirement Income Security Act (ERISA):

29 U.S.C. §1001
29 U.S.C. §1002(5)
29 U.S.C. §1002(7)
29 U.S.C. §1002(8)
29 U.S.C. §1003
29 U.S.C. §1132
29 U.S.C. §1144

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28 U.S.C. §1331
28 U.S.C. §2201

United States Constitution
Article VI, Clause 2

Connecticut Public Act No. 81-464 [Connecticut General Statutes §31-51h]

STATEMENT OF THE CASE

Stone & Webster Engineering Corporation originally instituted this action in the United States District Court for the District of Connecticut claiming that Connecticut General Statutes §31-51h was preempted under ERISA.

Stone & Webster was the employer of David Ilsley. David Ilsley was injured on the job and subsequently received work-

ers' compensation. Connecticut General Statutes §31-51h requires an employer to continue insurance coverage for injured workers while they are receiving, or eligible to receive, workers' compensation.

When Stone & Webster refused to make the contributions necessary to continue coverage, David Ilsley sought to compel his employer's compliance by taking the matter before the Connecticut Workers' Compensation Commission. At a hearing before the Commission, Stone & Webster claimed they should be relieved of their obligation under Connecticut law as the terms of the statute in question were preempted by ERISA. The Commission rejected this argument and ordered Stone & Webster to continue coverage as required by Connecticut General Statutes §31-51h. Stone & Webster then brought an action in the District Court claiming that ERISA preempted the Connecticut statute, thus relieving them of their obligation.

Stone & Webster filed a Motion for Summary Judgment in the District Court. In opposition to this motion, defendants claimed that ERISA afforded no jurisdiction for Stone & Webster, as an employer, to bring suit. Stone & Webster argued that, even if this were the case, they were entitled to bring the action under 28 U.S.C. §1331. The District Court found it unnecessary to reach the issue of whether Stone & Webster had standing to bring suit under the terms of ERISA. Citing *Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180 (S.D.N.Y. 1981), the District Court found jurisdiction under 28 U.S.C. §1331.

Defendants renewed their jurisdictional claims in the United States Court of Appeals for the Second Circuit. The Second Circuit agreed with defendants insofar as they claimed that ERISA afforded no jurisdiction to plaintiff as

an employer under 29 U.S.C. §1132(e)(1). Nevertheless, the Second Circuit found jurisdiction under 28 U.S.C. §1331.

In opposition to plaintiff's Motion for Summary Judgment in the District Court, defendants also claimed that Connecticut General Statutes §31-51h was not preempted by ERISA. Defendants argued that Connecticut General Statutes §31-51h was a valid exercise of Connecticut's police power, was consistent with the expressed policy of ERISA in seeking to protect workers and their dependents, and that the express language of ERISA did not operate to preempt the Connecticut statute. The District Court rejected defendants' arguments on preemption, and these claims were reasserted in the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the decision of the District Court in holding Connecticut General Statutes §31-51h preempted.

SUBSTANTIAL QUESTIONS PRESENTED

I. THE ENACTMENT OF LEGISLATION DURING THE PENDENCY OF THIS ACTION RENDERED THIS CASE MOOT PRIOR TO THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

The complaint herein was filed in the District Court on October 2, 1980. On October 1, 1981, Connecticut General Statutes §31-51h was repealed and Public Act 81-464 (App. at 38a) became effective.[1] The argument before the Second Circuit was on March 10, 1982. Although defendants did not specifically argue that plaintiff's cause was moot within the requirements of the Declaratory Judgment Act, 28 U.S.C.

[1]Connecticut General Statutes §2-32 provides that public acts shall take effect on October first following the session in which they were passed unless otherwise specified.

§2201, the new law was brought to the attention of the Court and reprinted in the brief of the *amicus* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

A controversy may end if the statute which is the basis for the conduct complained of is repealed or modified. *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Berry v. Davis*, 242 U.S. 468 (1917). "This Court must review the . . . judgment in light of presently existing Connecticut law"[2] *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975), citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972); *Hall v. Beals*, 396 U.S. 45, 48 (1969); *United States v. Alabama*, 362 U.S. 602, 604 (1960).

> . . . [C]ourts . . . must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

Public Service Commission v. Wycoff Co., 344 U.S. 237, 240 (1952).

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[2]The wisdom of this rule is underscored by the fact that questions have been raised in Connecticut as to the application of the new law in view of the Second Circuit's action with regard to the previous legislation.

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 37 (1950). Moot causes are vacated without costs. *Bus Employees v. Wisconsin Board*, 340 U.S. 416 (1951); *Natural Milk Ass'n. v. San Francisco*, 317 U.S. 423 (1943).

The repeal and modification of the statute held preempted by the Court of Appeals rendered this case moot as it no longer presented a controversy ripe for adjudication under the Declaratory Judgment Act. The judgment of the Court of Appeals for the Second Circuit should be vacated and the case remanded for dismissal without costs.[3]

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[3]The State of Connecticut has appeared as *amicus curiae* in another case involving ERISA preemption now pending in this Court. Delta Airlines v. Kramarsky, 485 F. Supp. 300, 666 F.2d 21 (2d Cir. 1981), *vacating* 650 F.2d 1287 (2d Cir. 1981), *prob. juris. noted*, 102 S.Ct. 1968 (1982). Pending response to a written request to counsel of record that a formal suggestion of mootness be filed, a letter has been submitted to the clerk of this Court by several appellants in *Delta* suggesting that the case is moot by virtue of the amendment to Title VII. P.L. 95-555, 42 U.S.C. 2000e(k). In Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities, 468 F.Supp. 490 (D.Conn. 1978), *aff'd mem.* 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), the Second Circuit recognized that ERISA would not preempt Connecticut's anti-discrimination statute subsequent to the amendment of Title VII, but did not consider the effects of this amendment on the justiciability of plaintiff's cause. (See Judge Lasker's opinion in *Delta* at 405 F.Supp. 300, 305 for text of Second Circuit memorandum in *Pervel*, which was unreported.) The issue of federal question jurisdiction was not raised in *Delta* while the matter was before the Court of Appeals, although, in the present case,

II. FEDERAL QUESTION JURISDICTION IS NOT AVAILABLE TO THIS PLAINTIFF AS AN EMPLOYER SEEKING TO ASSERT A FEDERAL PREEMPTION DEFENSE AGAINST A STATE PROCEEDING.

The Court of Appeals has acknowledged that ERISA affords no jurisdiction for Stone & Webster to bring this action in their capacity as employer. (App. at 9a). Nevertheless, the Court of Appeals has concluded that federal question "arising under" jurisdiction exists under 28 U.S.C. §1331.

The Court of Appeals notes that the question is a "troublesome" one that has "divided the courts and puzzled the commentators", (App. at 9a), and that "[a]ttempting to define an all inclusive test which will determine if a case 'arises under' the Constitution laws or treaties of the United States is like the exercise performed by the daughters of Danaus, condemned for eternity, as they were, to draw water with a sieve." (App. at 12a, n.4).

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), this Court adopted what has been called the historical test: a declaratory judgment suit may be entertained by federal courts only if the coercive action that would have been necessary, absent the declaratory judgment procedure,

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the Second Circuit subsequently conceded that there is no jurisdiction for employers to bring actions under ERISA. *Stone & Webster*, (App. at 9a). The above-mentioned appellants attempted to bring the issue of federal question jurisdiction to this Court's attention through a motion for divided argument and a request for leave to file a separate brief. The motion was denied. Neither counsel of record nor *amici* have briefed this issue in *Delta*.

could have been heard in federal court. Subsequently, in *Public Service Commission v. Wycoff Co., supra*, this Court suggested in dictum that the historical test could be applied to bar jurisdiction in declaratory suits alleging unconstitutional state action where the federal claim would have been asserted as a defense in a state court.

As noted by the Second Circuit, some courts have relied on the *Wycoff* dictum to deny jurisdiction to hear declaratory suits. *See, Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 253 n. 17 (7th Cir. 1981); *Home Federal Savings & Loan Ass'n v. Insurance Dep't.*, 571 F.2d 423 (8th Cir. 1978); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Comm.* 465 F.2d 273 (3rd Cir. 1972) (dictum), *cert. denied*, 410 U.S. 943 (1973). Other courts have attempted to distinguish *Wycoff*. *See Braniff International Inc. v. Florida Public Service Comm.*, 576 F.2d 1100 (5th Cir. 1978); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975).

This split in the circuits persists despite language from this Court reaffirming the historical test. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 69 n. 13 (1978); *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127, 128 (1974). The questions presented by the split in the circuits have long required plenary review by this Court.

The decision rendered by the Second Circuit in the present case highlights the necessity for clarifying the issue. While claiming to have applied the historical test in a classic case wherein the federal claim was a defense to a state proceeding, the Court found jurisdiction under §1331; a conclusion which should not flow from the application of the historical test to these facts. Citing, *Ex Parte Young*, 209 U.S. 123 (1908), the Court noted that coercive relief was sought to prevent interference with the right being asserted on the face of the complaint. The Court then concluded that the declaratory

claim was "not merely a defense, but affirmative and coercive relief is sought by way of an injunction." (App. at 11a). Defendants respectfully suggest that this rationale is inconsistent with precedents established by this Court inasmuch as the claim for injunctive relief seeks nothing more than to give effect to the declaratory relief sought. *See, Home Federal Savings & Loan, supra,* at 254 n. 18.

The facts of this case present all the elements essential to a final determination of the continuing controversy that this issue has spawned over many years. Should this Court determine that this matter is not moot, as defendants have suggested, this issue presents substantial questions meriting plenary consideration.

III. ERISA SHOULD NOT PREEMPT STATE LAW AFFORDING SUBSTANTIVE BENEFITS IN THE VALID EXERCISE OF POLICE POWER.

The Court of Appeals found the decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), controlling on the issue of ERISA preemption of the Connecticut statute. Defendants respectfully suggest that *Alessi* is misapplied in this case. *Alessi* dealt only with a method for calculating benefits under a plan, while *Stone & Webster* concerns a substantive benefit that Connecticut law says an employer must provide; the continuation of premium payments for accident, health and life insurance while a worker is receiving or eligible to receive workers' compensation.

This Court specifically declined to determine the "outer bounds" of ERISA's preemption provision in *Alessi* because the state statute in that case eliminated a method of calculating benefits that was permitted by federal law. *Alessi, supra,* at 524, 525. Inasmuch as *Stone & Webster* deals with the substantive benefits a plan must offer, and since there is

nothing in ERISA pertaining to substantive plan content, it cannot be said that the Connecticut law at issue herein eliminates that which is permitted under federal law.

The facts of this case present the necessary elements for a determination of the "outer bounds" of ERISA preemption.

By its terms, ERISA seeks to regulate only plan administration. In very specific language, the preemption clause seeks to supersede all state laws only through the provisions of "this subchapter" and "subchapter III". 29 U.S.C. §1144. "This subchapter" refers to subchapter I of ERISA and contains only administrative provisions such as reporting and disclosure, participation and vesting, funding, fiduciary responsibility, administration and enforcement. Subchapter III deals only with pensions and bears no relation to the question of employee welfare benefit plans.

Upon plenary consideration, a determination could be made as to whether the strictly administrative provisions of ERISA should operate to preempt the states in regulating substantive plan benefits in the exercise of functions traditionally within their police power. *See New York Central Railroad Co. v. White*, 243 U.S. 188 (1917) (sustaining constitutionality of workers' compensation legislation as valid exercise of police power).

The stated purpose in enacting ERISA was to provide for the well-being of employees and their dependents.[1] 29 U.S.C. §1001. Had ERISA's preemption clause not been applied to negate operation of Connecticut General Statutes §31-51h, the injured worker here would have been assured continuation of premium payments to provide insurance coverage at

[1] *See generally* Ackerman, *ERISA: Preemption of State Health Care Laws and Worker Well-Being*, U. Ill. L.R. 825 (1981).

a time when he was least able to protect himself and his family. This case presents the Court with an opportunity to reconcile the terms of ERISA with the expressed legislative intent of protecting workers and their dependents. Defendants respectfully suggest that this may be accomplished by taking one step beyond, and fully consistent with, *Alessi;* a holding that ERISA preemption does not reach state substantive law.

CONCLUSION

As this case is now rendered moot by the enactment of legislation during the pendency of this action, the judgment of the Court of Appeals for the Second Circuit should be vacated without costs.

Should this Court find this case is not moot, questions as to federal question jurisdiction and the limits of ERISA preemption are so substantial as to merit plenary consideration of the issues herein.

Respectfully submitted,

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. ARCUDI, *Chairman, Board of Compensation Commissioners, State of Connecticut;*
ROBIN W. WALLER, *Workers' Compensation Commissioner, Second District, State of Connecticut*
Petitioners

v.

STONE & WEBSTER ENGINEERING CORPORATION
Respondents

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 689, 990—August Term, 1981

(Argued March 10, 1982 Decided September 30, 1982)

Docket Nos. 81-7640; 81-7660

STONE & WEBSTER ENGINEERING CORPORATION,
Plaintiff-Appellee,

v.

DAVID B. ILSLEY; ROBIN W. WALLER, Workers Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; SPRINKLER FITTERS UNION LOCAL 676; and NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND,
Defendants,

DAVID B. ILSLEY; ROBIN W. WALLER, Workers Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; SPRINKLER FITTERS UNION LOCAL 676,
Defendants-Appellants.

Before:

NEWMAN and CARDAMONE, *Circuit Judges*,
and BURNS, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Ch. J.*, which granted plaintiff Stone & Webster Engineering Corporation's motion for summary judgment declaring that section 31-51h of the Connecticut General Statutes is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* and enjoining defendants from enforcing §31-51h against plaintiff.

Affirmed.

PAUL E. KNAG, *Stamford, Ct.* (Mark E. Fuhrmann, Cummings & Lockwood, Stamford, Ct., on the brief), *for Plaintiff-Appellee.*

NORMAN ZOLOT, Hamden, Ct., *for Defendants-Appellants Ilsley and Sprinkler Fitters Union Local 676.*

CHRISTINA G. DUNNELL, Assistant Attorney General, Hartford, Ct. (Carl R. Ajello, Attorney General, Bernard F. McGovern, Jr., Robert E. Walsh, Assistant Attorney General, Hartford, Ct., on the brief), *for Defendants-Appellants Waller and Arcudi.*

*The Honorable Ellen Bree Burns, Judge of the Uuited States District Court for the District of Connecticut, sitting by designation.

CARDAMONE, *Circuit Judge:*

We are called upon to determine whether state law may require an employer to provide health and life insurance coverage for a former employee now receiving workers' compensation due to a job related injury. Section 31-51h of the General Statutes of Connecticut[1] set forth in the margin so provides. In a suit brought by an employer seeking a declaratory judgment, the district court granted the employer summary judgment and held that the Connecticut statute "relates to" employee benefit plans and is therefore preempted by the Employee Retirement Security Act of 1974, 29 U.S.C. §1001 *et. seq.* (ERISA). For the reasons which follow, we affirm.

This action was instituted by plaintiff Stone & Webster Engineering Corporation (Stone & Webster), a company engaged in the design and construction of a nuclear power facility in Waterford, Connecticut. The defendants-appellants are: David B. Ilsley, a former employee of Stone &

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[1]Connecticut General Statutes Annotated §31-51h(a) (West Supp. 1981) provides, in pertinent part:

No employer, private, municipal or state, shall cancel or withhold accident and health insurance or life insurance coverage of any employee or his dependents or cease to make payments or contributions at the regular hourly or weekly rate for full-time employees for each week of disability to an employee's welfare fund as defined in subsection (h) of section 31-53 while the employee is eligible to receive or is receiving workers' compensation payments pursuant to chapter 568 or is receiving a continuation of salary or wages under a provision for sick leave payments for time lost for on the job injury. Such accident and health insurance coverage may include but shall not be limited to coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

I

Webster; Sprinkler Fitters Union Local 676 (Union), the labor organization representing Ilsley which had a collective bargaining agreement with Stone & Webster and whose appeal is jointed [sic] with that of appellant Ilsley; Robin W. Waller, a Connecticut Workers Compensation Commissioner, and John A. Arcudi, Chairman of the Board of Compensation Commissioners of the State of Connecticut–both of whom appeal on behalf of the State of Connecticut. The National Automatic Sprinkler Industry Welfare Fund (Fund) is a national employee welfare fund to which Stone & Webster makes contributions on behalf of its employees pursuant to a collective bargaining agreement. The Fund was a defendant below, but did not appeal. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America filed an amicus curiae brief in support of defendants-appellants.

II

Familiarity with the undisputed facts fully set forth in the district court's opinion is assumed. See *Stone & Webster Engineering Corp. v. Ilsley*, 518 F.Supp. 1297 (D. Conn. 1981). We recite only those facts necessary to resolve the issue before us on appeal.

In 1979 Stone & Webster, a Massachusetts corporation, employed defendant David Ilsley as a sprinkler fitter at its Waterford project. He commenced work on January 9, 1979 and was injured in the course of his employment on January 30, 1979. Ilsley has not been able to return to work since that time. Stone & Webster complied with the Connecticut Workers Compensation Law by insuring its obligations through Aetna Casualty and Surety Company. Neither plaintiff nor

its insurer contested Stone & Webster's liability to Ilsley for workers' compensation under the Workers Compensation Act, section 31-275 et seq. of the General Statutes of Connecticut. In fact, Aetna entered into a voluntary agreement to pay compensation due under that act.

Stone & Webster is a party to a collective bargaining agreement with the Union which requires the corporation to pay into the Fund 75 cents per hour for all hours worked by each employee. The fund provides eligible employees and their dependents coverage for medical, surgical and life insurance benefits. During the period of Ilsley's employment, Stone & Webster made the contributions required by the collective bargaining agreement. However, it ceased doing so from the date of Ilsley's disabling injury.

In his claim to the Workers Compensation Commissioner Ilsley alleged that Stone & Webster violated the Connecticut statute by not making contributions to the Fund while he was incapacitated with a compensable injury. On July 18, 1980, appellant Waller issued a "Finding and Award" requiring Stone & Webster, in accordance with Conn. Gen. Stat. §31-51h, to continue its contributions to the Fund on behalf of Ilsley so long as he is eligible to receive workers' compensation benefits. Stone & Webster appealed this decision to the Appellate Division of the Workers Compensation Commission (which appeal has not been decided) and instituted the present action in the district court to enjoin defendants from enforcing section 31-51h and the Finding and Award.[2]

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[2]Abstention, as urged in the amicus brief, under the doctrine of *Younger v .Harris*, 401 U.S. 37 (1971), is not appropriately invoked in a preemption case. *Marshall v. Chase Manhattan Bank*, 558 F.2d 680, 683-84 (2d Cir. 1977).

In Stone & Webster's instant action jurisdiction was claimed pursuant to 28 U.S.C. §§1331 ("arising under" jurisdiction) and 1337 (jurisdiction to regulate commerce and anti-trust) and 29 U.S.C. §1132(e)(1) (jurisdictional grant under ERISA); injunctive relief was sought pursuant to 28 U.S.C. §2202 and Rule 65 of the Federal Rules of Civil Procedure. The district court granted appellants' motion to stay execution of its judgment pending this appeal.

III

We must first consider the State of Connecticut's claim that only participants, beneficiaries or fiduciaries are empowered to institute an action for civil enforcement of ERISA in district court. 29 U.S.C. §1132(e)(1) (1976). It argues that as an employer Stone & Webster had no standing under the statute to institute this action. Plaintiff responds that, even in a case where the preemptive federal law provides it with no right to relief, the doctrine of preemption nevertheless provides "arising under" jurisdiction. The district court agreed with this argument and, without discussing standing, held that jurisdiction exists under 28 U.S.C. §1331.

Under the aegis of a state statute plaintiff is being pursued by Connecticut to pay money which it asserts it does not owe. It instituted this declaratory judgment action seeking

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[3]While an argument could be raised that this controversy could have been litigated in the Connecticut state courts, nevertheless, state court jurisdiction would not displace federal court jurisdiction in this case. Had Stone & Webster been named as defendant in a state action brought to enforce the provisions of the Connecticut statute, it would not have been barred from its present action in district court. The federal action would in that case simply seek a declaratory judgment that the putative state action was barred by ERISA. As such it would have been properly instituted.

to have its rights declared vis-a-vis the Connecticut statute in light of ERISA. The action was brought pursuant to 28 U.S.C. §2201 (1976 & Supp. IV 1980) which insofar as here pertinent provides: "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Since Stone & Webster is an employer whose interests were considered and protected by Congress when ERISA was enacted, *see* H.R. Rep. No. 93-533, 93d Cong., 1st Sess, *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, it is an interested party directly affected by the Connecticut statute which requires it to make payments on behalf of Ilsley into the Fund. Unquestionably, therefore, plaintiff has standing to litigate its claim that ERISA shields it from the operative effect of that state statute.

More troublesome, however, it whether federal question jurisdiction exists in view of the lack of jurisdiction afforded to plaintiff as an employer by ERISA under 29 U.S.C. §1332(e)(1). We turn to 28 U.S.C. §1331(a) to see whether the necessary jurisdiction can there be found. Whether section 1331 supplies jurisdiction for Stone & Webster's suit is an interesting question that has divided the courts and puzzled the commentators. There is no doubt that determining whether ERISA preempts Connecticut's statute is a federal question in the classic sense that Stone & Webster's claim prevails under its construction of federal law and loses under defendant's construction. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

What is in doubt is whether this federal question provides an occasion for invoking the federal question jurisdiction of the district court. The reason for doubt is because plaintiff's claim is one for declaratory judgment. That circumstance creates a tension between two doctrines: (1) The declaratory

judgment act is procedural only. Under the Federal Declaratory Judgment Act, 28 U.S.C. §2201 (1976 & Supp. IV 1980), Congress enlarged the range of remedies available to litigants in federal courts, but it did not extend the jurisdiction of the district courts. *See, Skelly Oil Co. v. Phillips Petroleum, Co.*, 339 U.S. 667 (1950); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300 (1943); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937). To permit a declaratory plaintiff to invoke federal jurisdiction to assert the validity of his federal defense, would thereby augment the availability of federal jurisdiction. Historically, jurisdiction may not be predicated upon a federal defense. *See Louisville & Nashville R. Co. v. Mottley*, 210 U.S. 149 (1908). (2) The old rule that the existence of a federal question is to be determined from the fact of a well-pleaded complaint, *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877), would seem to be satisfied whenever a declaratory plaintiff asserts a federal ground of nonliability. Professor Wright sees two possible approaches to the problem: the broad view that the adequacy of the declaratory complaint to invoke federal jurisdiction is to be tested by the face of the complaint (which would permit an expanded use of federal jurisdiction) or the narrow view that a declaratory defendant's complaint may be entertained only if the coercive action for affirmative relief, which the declaratory plaintiff is anticipating, could have been brought in federal court. Wright, *Federal Courts* 70 (3d ed. 1976). Wright and Miller assert, perhaps too confidently, that the narrow view is "the law today." 10 *Federal Practice and Procedure* §2767, p. 849 (1973).

The Supreme Court has expressed the view, although only in dictum, that a declaratory judgment plaintiff who asserts that defendant threatens to burden plaintiff's conduct of interstate commerce has only a defense that probably does not provide a basis for invoking federal question jurisdiction. *Public Service Commission v. Wycoff*, 344 U.S. 237 (1952).

Some courts have applied that dictum, *e.g., Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission*, 465 F.2d 237 (3d Cir. 1972); *Home Federal Savings & Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978), while others have carefully confined *Wycoff* to its context of a dispute not yet justiciable and upheld section 1331 jurisdiction for a declaratory judgment plaintiff asserting preemption, *e.g., Braniff International Inc., v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975). The problem stems from the rule of *Louisville & Nashville R. Co. v. Mottley*, *supra*, that a plaintiff's anticipation of a federal defense does not create federal question jurisdiction. In *Mottley* the plaintiff was claiming federal jurisdiction solely on the basis of a defense that *might* be asserted by the defendant railroad. But, as Professor Wright points out, *Federal Courts*, *supra*, at 71, the result might have been different in *Mottley* if the defendant railroad had come to federal court asserting its federal defense as the basis for a declaration of non-liability to the Mottleys' claim. In such a case, the federal defense is not speculative; it is being asserted.

Here not only is a right being asserted on the face of the complaint, but an injunction is also being affirmatively sought to prevent interference with that right. This claim raises federal question jurisdiction. *Ex parte Young*, 209 U.S. 123, 160 (1908). Regardless of whether, as in *Wycoff*, the equitable considerations necessary to support the issuance of an injunction are sufficiently alleged, jurisdiction under §1331(a) clearly exists since a declaratory judgment action may be entertained even where further relief is unavailable. 28 U.S.C. §2201 (1976). Thus, the historical test in *Mottley* has been satisfied. The declaratory claim asserted is not merely a defense, but affirmative and coercive relief is sought by way of an injunction. Note, *Federal Jurisdiction over Declaratory*

Suits Challenging State Action, 79 Colum. L. Rev. 983 (1977).

Having discussed the historical test and examined plaintiff's complaint in its light, we hasten to observe that there is no single, simple test to determine "arising under" jurisdiction in a given case. It would be easy if a preemption case, like a bankruptcy, patent, copyright or trademark matter, had the benefit of a statute which confers jurisdiction on the district court in which case "arising under" jurisdiction is not in issue. Some guidance comes from our previous holding that a cause of action invokes federal jurisdiction where the complaint is for a remedy expressly granted by an Act of Congress, or where it presents a claim requiring construction of the Act. *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965). Plaintiff's claim here is not only one which originates from a federal statute, but is one whose vindication turns on preemption expressly contained in it. Under these circumstances a declaratory plaintiff can come into federal court asserting that preemption affords it insulation from a state-based claim. *See Gully v. First National Bank*, 299 U.S. 109, 112 (1936) (federal question jurisdiction exists when a right or an "immunity" created by federal law is an essential element of plaintiff's cause of action). Finally, we are satisfied that this case meets the many "arising under" tests[4] for federal jurisdiction, not the

[4]Attempting to define an all inclusive test which will determine if a case "arises under" the Constitution, laws, or treaties of the United States is like the exercise performed by the daughters of Danaus, condemned for eternity, as they were, to draw water with a sieve. The test from which all the others have their genesis is one devised by Chief Justice Marshal in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (for determining the scope of federal question jurisdiction under Article III); it is referred to as the "ingredient" test and holds that when an ingredient of the cause of action involves federal law, "arising

least of which is that pragmatic considerations make it eminently logical and sensible that the forum for such a dispute be the federal district court.

IV

Section 514 of ERISA, 29 U.S.C. §1144, provides that applicable provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." In order to determine whether Stone & Webster may be required to make payments to the Fund on Ilsley's behalf, we must decide the single substantive issue—whether §31-51h of the General Statutes of Connecticut "relate[s] to" an employee benefit plan. If so, it is void under the Supremacy Clause contained in Article VI of the Constitution.

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under" jurisdiction may properly be invoked. Justice Holmes' classic rule states that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Under his view, if the cause of action was substantively created by federal law, it "arises under" that law and invokes federal jurisdiction. In *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936), Justice Cardozo concluded that the decisive test was whether the *right* to be established was federal in nature. The mere fact that the *source of authority* to establish such a right takes its origins in the laws of the United States did not necessarily make the suit one that arises under those laws. *Id.* at 114. The judicial quest for an immutable rule seems doomed never to succeed, for underlying federal question jurisdiction, as the commentators suggest, there exist innate concepts, broad and flexible in nature so as to make available what is perceived of as a necessary forum for the vindication of national interests. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 162, 165 (1953); C. Wright, *Handbook of The Law of the Federal Courts* 67 (1970). These national interests may not always be foreseen, and obviously they change over a period of time.

We view *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), as controlling. The threshold issue it poses is: what defines an employee benefit which once vested cannot, under ERISA, be forfeited. The answer is found, the Court tells us, in the arrangements made by the private parties creating the employee benefit plan. *Id.* at 511. Stone & Webster and the Union are parties to a collective bargaining agreement of which Ilsley is a beneficiary. That agreement provides for a welfare fund from which insurance benefits are paid to employees covered by the bargaining unit. No provision of either the Fund or the agreement requires continuing contributions by the employer when a former employee is receiving workers' compensation benefits. The response to the threshold question posed by *Alessi* must therefore be that the private parties in this case did not define Connecticut's continuing contribution requirement as a nonforfeitable benefit.

Congress has stated that the provisions of ERISA "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. §1144(a) (1976). A state law "relate[s] to" an employee benefit plan and is subject to preemption whenever it "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. §1144(c)(2) (1976). In these provisions Congress clearly eliminated the threat of conflicting or inconsistent state and local regulation of employee benefit plans. Not only this literal language, but also its purpose, must be given force and effect. A reading of ERISA's legislative history reveals the broad sweep of its reach.

We acknowledge the concern of the State of Connecticut for its injured workers and their dependents. In Ilsley's case

he will lose the broad comprehensive insurance coverage he previously had under the Fund's provisions. The indisputable fact remains that the Connecticut statute requires an employer to make a contribution to the fund for a former employee–as such, a pension benefit–which was not bargained for or agreed to in the contract between the employer and the union. We conclude therefore that section 31-51h of the General Statutes of Connecticut constitutes a forbidden state encroachment on a private employee benefit plan. Its only purpose is to add an additional statutory requirement–the cost of which is to be borne by the employer–to a private employee benefit plan. Thus, the state statute relates to an employee benefit plan as defined by ERISA and must be construed as preempted by 29 U.S.C. §1144(a).

V

Finally, we turn to appellants' arguments that the Connecticut statute is for one reason or another excepted from preemption. First, appellants contend that the state statute touches the benefit plan only as a "remote and peripheral" regulation. Our Court found the state regulation in *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979), to be so remote as to be "impliedly excepted from preempted state law relating 'to any employee benefit plan.'" *Merry* dealt with whether a husband's pension fund could be garnished by his wife seeking to enforce a state court judgment providing for her support. The ancient family law concepts of maintenance and support of a spouse and the use of a state court's process to uphold and enforce a spouse's rights were not thought to have been preempted by ERISA. Thus, the rationale expressed in *Merry* can scarcely serve as a precedent for defendants in this case.

Second, under 29 U.S.C. §1144(a), benefit plans that are themselves exempted from ERISA coverage are excepted

from preemption. On rehearing *Delta Air Lines, Inc. v. Kramarsky*, 666 F.2d 21, 25 (2d Cir. 1981), *vacating* 650 F.2d 1287 (2d Cir. 1981), *prob. juris. noted*, 102 S.Ct. 1968 (1982), in light of *Alessi* we reiterated the rule that, as instructed by the Supreme Court, *Alessi* at 523 n.20, the only state laws which survive preemption are those relating to plans that are themselves exempted from ERISA. The Fund, which here provides the benefits, is by its own terms expressly subject to ERISA.

Third, appellants argue that §31-51h was established solely to comply with the state workers' compensation law or, alternatively, that its purpose is to regulate insurance; under either view of its purpose, appellants claim the statute is within one of the several categories to which ERISA's preemption does not apply. Excepted from ERISA coverage are plans "maintained *solely* for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws," 29 U.S.C. §1003(b)(3) (1976) (emphasis supplied). Of course, the plan in this case, similar to the one in *Alessi*, is one broadly designed to serve employees' needs and resulted from collective bargaining and cannot be said to be maintained "solely" for the purpose of complying with Connecticut's laws. *See, Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1306 (2d Cir. 1981). ERISA also explicitly preserves state regulations of insurance, banking and securities, 29 U.S.C. §1144(b)(2)(A) (1976). There is, however, no correlation between these fields and the Connecticut Workers' Compensation Law.

We recognize that the provisions of section 31-51h of the Connecticut General Statutes concern a matter within that state's police power. Nonetheless, following the rehearing in *Delta*, and in accord with *Alessi*, such law insofar as it

affects employee benefit plans covered by ERISA is pre-empted by it, and is void under the Supremacy Clause.

Accordingly, the judgment enjoining appellants from enforcing this statute against Stone & Webster is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STONE & WEBSTER ENGINEERING CORPORATION	:	
Plaintiff,	:	Civil Action No. H-80-598
v.	:	
DAVID B. ILSLEY; ROBIN W. WALLER, Workmen's Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; SPRINKLER FITTERS UNION LOCAL 676; and NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND,	:	
Defendants.	:	

RULING ON MOTIONS TO DISMISS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

The defendants' motions to dismiss were made pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure and the cross-motions of the parties for summary judgment are before the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure. The principle issue before the Court, aside from the question of jurisdiction, is whether a Connecticut statute, which regulates the duration of payments

made by an employer to an employee union welfare fund, is preempted by the Employee's Retirement Income Security Act (ERISA), 29 U.S.C. §§1001-1381. The fund is part of an employee's union benefit plan, as described in ERISA. The Court finds that it has subject matter jurisdiction and that the state statute interferes with a voluntary, social insurance program. Said program is part of a complex scheme of benefits which was established through collective bargaining. The Court finds that regulatory interference by the state is impermissible, in that the state statute is preempted by ERISA.

Jurisdiction

The defendants, Waller, Arcudi, Ilsley, and Sprinkler Fitters Union Local 676 have challenged the Court's jurisdiction in this case. They claim that only participants, beneficiaries, or fiduciaries are authorized to bring such an action. *See* 29 U.S.C. §1132. They argue that Stone & Webster Engineering Corporation does not fit into any of these categories. However, this argument is misdirected, inasmuch as the plaintiff has alleged that it is being compelled, pursuant to a state statute, to make certain payments to a welfare fund. These payments represent a burden which is beyond the plaintiff's contractual obligations, as those obligations are stated in a collective bargaining agreement. *See Ilsley v. Stone & Webster Engineering Corp.*, Dec. by Comp. Comm'r (July 18, 1980). The plaintiff claims that the welfare fund mentioned in the agreement is part of an employee benefit plan, and so is not subject to state regulation due to the preemption provision of ERISA. 29 U.S.C. §1144. The presence of this issue makes it unnecessary to determine, at this time, whether the plaintiff has standing under 29 U.S.C. §1132. This civil action arises under the Constitution of the United States, and jurisdiction exists pursuant to 28 U.S.C. §1331. *Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rain-*

wear & Allied Workers' Union, 511 F. Supp. 1180, 1187 (S.D.N.Y. 1981) ("any time a court finds preemption it should conclude that the action arises under federal law . . . even in a case where the preemptive federal law provides the plaintiff with no right to relief."). *See T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964).

Facts

The facts in this case are not in dispute. Defendant Ilsley began his employment with the plaintiff as a sprinkler fitter on January 9, 1979. On January 30, 1979, Ilsley was injured while at work, and thereafter he received Workmen's Compensation benefits from the plaintiff. The latter was bound by a collective bargaining agreement with the employee's union throughout this period. The agreement established various terms and conditions of employment for all sprinkler fitters, including Ilsley. One aspect of the agreement provided that the plaintiff make certain payments to a walfare fund, in order to furnish various life and health insurance benefits for the sprinkler fitter employees. *See* Plaintiff's Exhibit B at art. 19; Plaintiff's Exhibit C. The agreement further provided that the plaintiff's payments to the fund should be at the rate of seventy-five cents per hour "for all hours worked by all employees. . . ."

The plaintiff claims that, under the terms of the agreement, it need not make the further contributions on behalf of Ilsley, since he can not claim any "hours worked" subsequent to his injury. The defendants counter that a Connecticut statute requires that payments to such a walfare fund must continue even "while the employee is eligible to receive or is receiving workmen's compensation payments. . . ." Conn. Gen. Stat. §31-51h. The plaintiff replies that the welfare fund is an "employee benefit plan," as defined by ERISA,[1]

[1] 29 U.S.C. §1002(3).

and so is shielded from state regulation by the preemption provision of ERISA. 29 U.S.C. §1144(a).

On July 18, 1980, the Workmen's Compensation Commission considered, and rejected, the plaintiff's argument. The Commissioner found that, in the absence of direct conflict, the state and federal laws operated concurrently. *Ilsley v. Stone & Webster Engineering Corp.*, Dec. by Comp. Comm'r at 7 (July 18, 1980). The plaintiff instituted this suit on October 2, 1980, and alleges that the state law cannot apply to employers who are subject to ERISA, due to the preemption provision of 29 U.S.C. §1144(a).

Discussion of the Law

The preemption provision of ERISA is extremely broad in scope. That statute states, in pertinent part,

> "Except as provided in subsection (b) of this section,[2] the provisions of this subchapter and subchapter III of this chapter shall supersede *any and all* State laws insofar as they may now or hereafter relate to *any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. §1144(a) (emphasis added).

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[2]None of the exceptions of 29 U.S.C. §1144(b) apply in this case. Connecticut General Statutes §31-51h is not a regulation of "insurance, banking, or securities," simply because it mentions life and health insurance. The statute is facially aimed at employers, and in this case it has a direct bearing on a walfare benefit plan. Rather than an insurance regulation, it is an attempt to control the timing and extent of those employer contributions which serve to provide insurance coverage to employees. Therefore, the exemption of §1144(b)(2)(A) does not apply in this case. *See contra* Memorandum of Defendants Ilsley and Sprinkler Fitters Local Union at 10-12 (Apr. 8, 1981).

The Second Circuit has recently held that the legislative history of section 1144(a) "leads us to conclude that the statute is as sweeping as it seems." *Delta Air Lines, Inc. v. Kramarsky*, 25 Fair Empl. Prac. Cas. 1193, 1204 (2d Cir. May 11, 1981). This Court will view the issue at bar from the perspective demanded by *Delta*. It is this perspective, in part, which leads the Court to reject, at the outset, any suggestion that section 1144(a) applies more strongly to pensions than to welfare benefit plans. *See contra*, Memorandum of Defendants Waller and Arcudi at 9 (Mar. 30, 1981). Section 1144(a) applies to state laws which relate to any employee benefit plan, and the latter phrase clearly includes *both* "employee welfare benefit plan[s]" and "employee benefit pension plan[s]". 29 U.S.C. §1002(3).

I

The first significant issue before the Court is whether the statute at issue, Conn. Gen. Stat. §31-51h, "relate[s] to" the employee benefit plan maintained by the plaintiff. The defendants argue that section 31-51h "relates to" employers, rather than to the employee benefit plan; that an increase in employer obligations "in no way impacts upon the fund." In looking at the obverse side of this issue, the defendants assert that ERISA "does not purport to establish contribution levels, or even to set guidelines for the basis of contribution levels." The answers to these contentions depend upon an examination of the relevant statutes. The state statute at issue, Conn. Gen. Stat. §31-51h, states, in pertinent part,

> "(a) No employer . . . shall cancel or withhold accident and health insurance or life insurance coverage of any employee or his dependents or cease to make payments or contributions at the regular hourly or weekly rate for full-time employees for each week of disability to an employee's welfare fund as defined in subsection (h) of

> section 31-53 while the employee is eligible to receive or is receiving workers' compensation payments pursuant to chapter 568. . . ."

It is quite apparent that this statute purports to regulate the duration of employer contributions to employee welfare funds. In the case at bar, the prescribed duration of employer contributions is embodied in a collective bargaining agreement, and as stated therein, employer contributions to the employee welfare fund need not continue while the employee is not actually working. This is not a "remote and peripheral" regulation of the benefit plan. *See American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979). Section 31-51h fundamentally and directly alters the employer's negotiated obligations, as they are stated in Article 19 of the plan.[3] The statute therefore regulates the benefits provided under the plan, and so it "relates to" the plan. *Delta Air Lines, Inc. v. Kramarsky*, 25 Fair Empl. Prac. Cas. 1193, 1204 n.23 (2d Cir. May 11, 1981).

The United States Supreme Court has recently addressed the "relates to" issue, and has suggested an approach which seems even broader than that taken by the Second Circuit in *Delta*. The Supreme Court held that it is immaterial that a state statute intrudes indirectly,

> "rather than directly, through a statute called 'pension regulation.' ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For purposes of the preemption provision, ERISA defines the term State to

[3]The Court notes that the phrase "relates to" does not limit 29 U.S.C. §1144(a) to those state laws that are directed to ERISA's subject matter. *Delta Air Lines, Inc. v. Kramarsky*, 25 Fair Empl. Prac. Cas. 1193, 1204 (2d Cir. May 11, 1981).

> include: 'a State, or any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly* or *indirectly*, the terms and conditions of employee benefit plans covered by this title.' 29 U.S.C. §1144(c)(2) (emphasis added [by the Supreme Court]). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 49 U.S. L. W. 4503, 4508 (U.S. May 18, 1981) (Nos. 79-1943 and 80-193).

Thus, no weight can be given to defendants' claim that section 31-51h regulates "employers" and not "plans."

Similarly, the Court must reject the defendants' argument that section 31-51h is not preempted by ERISA because ERISA "does not purport to establish contribution levels, or even to set guidelines for the basis of contribution levels." Memorandum of Defendant National Automatic Sprinkler Industry Welfare Fund at 9 (Mar. 20, 1981). The Second Circuit, in *Delta*, noted that section 1144(a)

> "was meant to clear away all state laws bearing on benefit plans [even though] many aspects of benefit plans generally, and of welfare benefit plans in particular, will go unregulated under this regime of broad preemption, and that §514(a) [29 U.S.C. §1144(a)] may therefore permit abuses that Congress might otherwise have wished to avert." *Delta* at 1205.

Except for various narrow exceptions to its broad brush of preemption, section 1144(a) protects all ERISA employee benefit plans. *Id.* Thus, there is no requirement that this Court identify an ERISA provision which deals specifically

with contribution levels.[4] ERISA may not confront the "contribution level" issue at this time, but section 1144(a) has cleared the decks for such provisions, should Congress choose to address this concern in the future.

II

The remaining significant claim of the defendants is that section 31-51h is exempt from preemption because it falls within the exception stated in 29 U.S.C. §1003(b)(3). This statute excepts plans which are "maintained solely for the purpose of complying with applicable workman's compensation laws. . . ." The Supreme Court indicated, in *Alessi*, that this exception must be read most narrowly:

> "the relevant exemption from ERISA's coverage–for plans maintained *solely* for compliance with state workers' compensation laws–has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining." *Alessi v. Raybestos-Manhattan, Inc.*, 49 U.S.L.W. 4503, 4508 n. 20 (U.S. May 18, 1981) (Nos. 79-1943 and 80-193) (emphasis in original).

The Second Circuit has addressed the exception issue in more detail, and has stated that the policies of section 1003(b)(3)

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[4]It appears that employer contributions to a welfare fund is one of many areas which Congress, through ERISA, sought to leave solely in the hands of employers and employees. *See, e.g.*, 29 U.S.C. §§1022(b), 1102(b). In addition, 29 U.S.C. §1144(c)(2) indicates that a state law is preempted when it attempts to regulate "the terms and conditions of employee benefit plans covered by this title." Thus, a statute may be invalid if it merely attempts to regulate a protected plan. There is no requirement that ERISA must give explicit approval to a particular term or condition before preemption may be found.

do not apply to state statutes which relate to those plans that are voluntarily provided by the employer.

> "[B]ecause such voluntary programs are typically part of a complex benefits scheme established through collective bargaining, state efforts to regulate them pose a significant risk of conflict with ERISA requirements.
>
> ....
>
> Particularly because state law does not compel employers to establish programs of this sort, it would be sensible to say . . . that such programs are not maintained 'solely' to comply with state laws. . . ." *Delta Air Lines, Inc. v. Kramarsky*, 25 Fair Empl Prac. Cas. 1193, 1207 (2d Cir. May 11, 1981).

Having defined "solely," the Second Circuit stated that the word "plan," as used in section 1003(b)(3),

> "must refer to a benefits program as an integral administrative unit. If an employer, using a single administrative unit, provides disability benefits as a part of a larger welfare scheme, comprising, for example, health insurance as well as disability benefits, then that scheme as a whole constitutes the employer's 'plan.' Because such a plan provides types of benefits that the states cannot permissibly require under §514(a) [§1144(a)], the plan could not be said to be maintained 'solely' to comply with state disability insurance laws." *Id.*

Turning to the issues at bar, the Court notes, first, that Conn. Gen. Stat. §31-51h is not a workers' compensation law. To rephrase a point made earlier in this discussion, *see* note 2 *supra*, the use of the phrase "workers' compensation" in section 31-51h does not, by its mere presence, convert that

statute into a Workmen's Compensation statute. *Cf. Standard Oil Co. v. Agsalud*, 633 F.2d 760, 764 (9th Cir. 1980). The statute is, instead, an attempt to intrude upon employer/employee relations and, as such, is properly located in Chapter 557, the "Regulation of Employment" chapter of the Connecticut General Statutes. It bears no meaningful relation to the Connecticut Workmen's Compensation Act, as enunciated in Chapter 568 of the Connecticut General Statutes.

Second, these contributions are part of a voluntary arrangement between the employer and the employee. Neither section 31-51h nor any other Connecticut statute requires that an employer make contributions to a welfare fund. Section 31-51h merely controls the duration of such payments, once a contribution arrangement is established.

Third, the welfare plan agreement at issue is not a "separate" plan, but is rather one part of a complex benefits scheme[5] which was established through collective bargaining. *Delta* at 1207. Any one of these conclusions, and certainly all of them combined, indicate that the defendants cannot avail themselves of the narrow exception provided by section 1003(b)(3).

Conclusion

Connecticut General Statutes section 31-51h "relates to" the employee benefit plan in this case, and so it is within the preemption provision of 29 U.S.C. §1144(a). Section 31-51h is not a Workmen's Compensation law, nor is the plan

[5]The Court notes that there is an "additional federal interest in precluding state inference with labor-management negotiations" when the plan emerges from collective bargaining. *Alessi v. Raybestos-Manhattan, Inc.*, 49 U.S.L.W. 4503, 4508 (U.S. May 18, 1981) (Nos. 79-1943 and 80-193).

at issue one which is maintained solely to comply with state requirements. *See* 29 U.S.C. §1003(b)(3). Therefore, section 31-51h is not excepted from 29 U.S.C. §1144(a). Accordingly, this Court finds that section 31-51h of the Connecticut General Statutes, as to the benefit plan at issue, is preempted by ERISA, 29 U.S.C. §§1001-1381. Section 31-51h is, in this context, void under the Supremacy Clause. U.S. Const. art. VI, cl. 2. The plaintiff's motion for summary judgment is granted; the defendants' motions to dismiss and cross-motions for summary judgment are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 31st day of July, 1981.

T. Emmet Clarie
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STONE & WEBSTER ENGINEERING CORPORATION	:	
v.	:	Civil Action No. H-80-598
DAVID B. ILSLEY; ROBIN W. WALLER, Workmen's Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; SPRINKLER FITTERS UNION LOCAL 676; and NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND	:	

JUDGMENT

This action having come before the Honorable T. Emmet Clarie, Chief United States District Judge, for consideration of the Defendants' Motions to Dismiss and Motions for Summary Judgment, and the Plaintiff's Motion for Summary Judgment; and,

The Court having considered the Motions and all papers filed in support of and in opposition to the Motions, and the Court having filed its Ruling on Motions to Dismiss and Cross-Motions for Summary Judgment on August 3, 1981, denying the Defendants' Motions to Dismiss and Motions for Summary Judgment, and granting the Plaintiff's Motion for

Summary Judgment, finding that section 31-51h of the Connecticut General Statutes, as to the benefit plan at issue, is preempted by ERISA, 29 U.S.C. §§1001-1381 and therefore void, in this context, under the Supremacy Clause,

It is accordingly ORDERED, ADJUDGED and DECREED that Judgment be and is hereby entered in favor of the Plaintiff, declaring that section 31-51h of the Connecticut General Statutes, as to the benefit plan at issue in the context of this case, is preempted by ERISA, 29 U.S.C. §§1001-1381 and void under the Supremacy Clause, U.S. Const. art. VI, cl. 2, as set forth in the Court's Memorandum.

Dated at Hartford, Connecticut, this 1st day of September, 1981.

SYLVESTER A. MARKOWSKI
Clerk, United States
District Court

By: JOHN K. HENDERSON, JR.
Deputy-in-Charge

APPROVED:
T. EMMET CLARIE
Chief U.S. District Judge
9/1/81

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION	:	
v.	:	Civil Action No. 81-7640
DAVID B. ISLEY, *et al.*	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robin W. Waller and John A. Arcudi, defendants in the above-named action, appeal to the Supreme Court of the United States from the judgment affirming the judgment of the District Court enjoining the enforcement of Connecticut General Statute §31-51h and declaring said Connecticut statute void under the Supremacy Clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Dated at Hartford, Connecticut, this 2nd day of November, 1982.

CARL R. AJELLO
Attorney General

By: CHRISTINA G. DUNNELL
Assistant Attorney General
P.O. Box 120
Hartford, Connecticut 06101
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this date to the following persons:

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CHRISTINA G. DUNNELL
Assistant Attorney General

CONSTITUTIONAL AND STATUTORY PROVISIONS

ERISA, 29 U.S.C., in pertinent part:

§1001. Congressional findings and declaration of policy.

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure he made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenue of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endan-

gered; that owing to the termination of plans before requisite funds have been accumulated, employees and their bnefiiciaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§1002(5). Definitions.

For purposes of this subchapter:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer,

in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

§1002(7). Definitions.

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§1002(8). Definitions.

For purposes of this subchapter:

* * *

(8) The term "benefiiciary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

§1003. Coverage.

* * *

(b) The provisions of this subchapter shall not apply to any employee benefit plans if–

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

§1132. Civil Enforcement.
Jurisdiction.

(a) A civil action may be brought–

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

* * *

(e) (1) Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction

and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a) (1) (B) of this section.

§1144. Other laws.

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

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28 U.S.C. §1331. Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §2201.

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

United States Constitution:

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Connecticut Public Act No. 81-464 [Connecticut General Statutes 31-51h].

[The lower case type sets out the provisions in effect at the time this action began. Upper case type shows additions made before the decision of the Court of Appeals for the Second Circuit. There were no deletions.]

PUBLIC ACT NO. 81-464

AN ACT CONCERNING EMPLOYER INSURANCE CONTRIBUTIONS FOR PERSONS RECEIVING WORKERS' COMPENSATION.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (a) of section 31-51h of the general statutes is repealed and the following is substituted in lieu thereof:

(a) No employer, private, municipal or state, shall cancel or withhold accident and health insurance or life insurance coverage of any employee or his dependents or cease to make payments or contributions EITHER at the regular hourly or weekly rate for full-time employees for each week of disability to an employee's welfare fund as defined in subsection (h) of section 31-53, OR FOR SUCH HOURS OF CONTRIBUTIONS ESTABLISHED BY THE TRUSTEES OF THE EMPLOYEE'S WELFARE FUND AS NECESSARY TO MAINTAIN CONTINUATION OF SUCH INSURANCE COVERAGE, WHICHEVER IS THE LESSER AMOUNT, while the employee is eligible to receive or is receiving workers' compensation payments pursuant to chapter 568 or is receiving a continuation of salary or wages under a provision for sick leave payments for time lost for on the job injury. IN ANY CASE WHERE WORKERS' COMPENSATION PAYMENTS TO AN INDIVIDUAL FOR TOTAL INCAPACITY UNDER THE PROVISIONS OF SECTION 31-307 CONTINUE FOR MORE THAN ONE HUNDRED FOUR WEEKS, THE COST OF SUCH ACCIDENT AND HEALTH INSURANCE OR LIFE INSURANCE COVERAGE AFTER THE ONE HUNDRED FOURTH WEEK SHALL BE PAID OUT OF THE SECOND INJURY FUND IN ACCORDANCE WITH THE PROVISIONS OF SECTION 31-349, AS AMENDED BY SECTION 2 OF THIS ACT. Such accident and health insurance coverage may include but shall not be limited to coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy

and child care. Any employee aggrieved by an act of any employer in violation of this section shall have a cause of action for damages for any injury suffered by him because of such violation. All costs of such suit including reasonable attorney's fe ⁊ shall be charged to any defendant employer who is adjudged to have violated this section. The injured employee's employer when reporting the accident to the workers' compensation commissioner shall furnish the commissioner with information as to the time of the injury and as to the amount of payment or contribution payable to any employee welfare fund on a forty hour week of work OR ANY LESSER AMOUNT WHICH THE TRUSTEES OF THE EMPLOYEE'S WELFARE FUND HAVE DETERMINED TO BE NECESSARY TO MAINTAIN SUCH INSURANCE COVERAGE. The commissioner in awarding benefits for temporary and permanent partial and total disability shall require continuation of such insurance coverage or contribution to an employee welfare fund by forty hours, OR ANY SUCH HOURS OF CONTRIBUTIONS ESTABLISHED BY THE TRUSTEES, for the period of the injured employee's eligibility to receive such workers' compensation benefits.

Sec. 2. Section 31-349 of the general statutes is repealed and the following is substituted in lieu thereof:

The fact that an employee has suffered previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury, nor preclude compensation for death resulting therefrom. If an employee who has previously incurred, by accidental injury, disease or congenital causes, total or partial loss of, or loss of use of, one hand, one arm, one foot or one eye, or who has other permanent physical impairment, incurs a second disability by accident or disease arising out of and in the course of his employment, resulting in a permanent disability caused by

both conditions which is materially and substantially greater than that which would have resulted from the second injury alone, he shall receive compensation for the entire amount of disability, including total disability, less any compensation benefits payable or paid with respect to the previous disability, and necessary medical care, as elsewhere provided in this chapter, notwithstanding the fact that part of such disability was due to prior accidental injury, disease or congenital causes. The employer by whom the employee is employed at the time of the injury, or his insurance carrier, shall in the first instance pay all awards of compensation and all medical expenses provided by this chapter for the first one hundred four weeks of disability. As a condition precedent to the liability of the second injury fund, the employer or his insurance carrier must, ninety days prior to the expiration of the one-hundred-four-week period, notify the custodian of the second injury fund of the pending case and shall furnish to said custodian a copy of the agreement or award together with all information purporting to support his claim as to the liability of the second injury fund, and shall make available to the custodian all medical reports as the custodian shall desire. Failure on the part of the employer or the carrier to comply does not relieve the employer or carrier of its obligation to continue furnishing benefits under the provisions of the act. In the event the custodian shall reject the claim of the employer and its insurer, the question shall be submitted to the commissioner having jurisdiction, as promptly as possible, and the employer or carrier shall continue furnishing benefits until the outcome is finally decided, and if the employer or carrier prevails all payments made beyond the one-hundred-four-week period shall be reimbursed to the employer or carrier by the second injury fund. After the employer or its insurer has completed the payment for the one-hundred-four-week period, he shall file with the commissioner having jurisdiction, and with the custodian of the

second injury fund, a form indicating that all compensation and medical bills have been paid for the one-hundred-four-week period, and indicating thereon the date the custodian was notified of the pending case. Thereafter all responsibility for compensation and medical treatment shall be with the custodian of the second injury fund. If the subsequent injury of such an employee resulting from an accident arising out of and in the course of his employment shall result in the death of the employee, and it shall be determined that either the injury or death would not have occurred except for such pre-existing permanent physical impairment, the employer or his insurance carrier shall, in the first instance, pay the funeral expense described in this chapter, and shall pay death benefits as may be due for the first one hundred four weeks. Ninety days prior to the expiration of the one-hundred-four-week period, the employer or his insurance carrier shall notify the custodian of the second injury fund of the pending case and shall furnish to said custodian a copy of the agreement or award. After the employer or its insurer has completed the payment for the one-hundred-four-week period, he shall file with the commissioner having jurisdiction, and with the custodian of the second injury fund, a form indicating that all compensation has been paid for the one-hundred-four-week period, and indicating thereon the date that the custodian was notified of the pending case. Thereafter all responsibility for compensation shall be with the custodian of the second injury fund. Employees shall not be denied any of the benefits provided by any provisions of this chapter by reason of the execution of an acknowledgment of physical defect, but the benefits specified in this chapter which would be payable except for the execution of such acknowledgment shall be paid entirely out of the second injury fund. Claims for such benefits shall be filed with the commissioner, who shall refer such claims to the custodian of the second injury fund as specified above. The custodian of the second injury fund may

make payment by way of final settlement in any matter concerning the fund, subject to the approval of the commissioner, when it is for the best interests of the injured employee. IN ANY CASE WHERE WORKERS' COMPENSATION PAYMENTS TO AN INDIVIDUAL FOR TOTAL INCAPACITY UNDER THE PROVISIONS OF SECTION 31-307 CONTINUE FOR MORE THAN ONE HUNDRED FOUR WEEKS, THE COST OF ACCIDENT AND HEALTH INSURANCE OR LIFE INSURANCE COVERAGE REQUIRED UNDER SECTION 31-51h, AS AMENDED BY SECTION 1 OF THIS ACT, SHALL BE PAID OUT OF THE SECOND INJURY FUND AFTER THE ONE HUNDRED FOURTH WEEK. EMPLOYERS SHALL NOTIFY THE CUSTODIAN OF THE SECOND INJURY FUND WITHIN SIXTY DAYS OF THE EXPIRATION OF THE ONE-HUNDRED-FOUR-WEEK PERIOD THAT SUCH COVERAGE IS REQUIRED. IF THE INDIVIDUAL HAS RECEIVED SUCH COMPENSATION PAYMENTS FOR MORE THAN ONE HUNDRED FOUR WEEKS AS OF THE EFFECTIVE DATE OF THIS ACT, THE EMPLOYER SHALL NOTIFY SAID CUSTODIAN WITHIN SIXTY DAYS OF THE EFFECTIVE DATE THAT COVERAGE IS REQUIRED.

Approved June 29, 1981.